JD–22–04
Glens Falls, NY

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

FINCH, PRUYN & COMPANY, INC.

and

Cases 3-CA-23461-1
3-CA-23461-2[1]

PAPER, ALLIED-INDUSTRIAL, CHEMICAL
& ENERGY WORKERS INTERNATIONAL
UNION, AFL-CIO

Robert A. Ringler, Esq., of Albany, NY,
for the General Counsel.
James R. LaVaute, Esq., and *Stephanie A. Miner, Esq.,*
of Syracuse, NY, for the Charging Party.
John S. Irving, Esq., of Washington, DC, *William Bevan, III, Esq.,*
of Pittsburgh, PA, and *Michael T.Wallender, Esq.,* of Albany, NY,
for the Respondent-Employer.

DECISION

Statement of the Case

Bruce D. Rosenstein, Administrative Law Judge.[2] This case was tried before me on December 8 through 12 and December 16 through 18, 2003, in Albany, New York, pursuant to an Amended Consolidated Complaint and Notice of Hearing in the subject cases (complaint) issued on June 19, 2003, by the Acting Regional Director for Region 3 of the National Labor Relations Board (the Board). The underlying charges and amended charges were filed on various dates in 2002 by Paper, Allied-Industrial, Chemical & Energy Workers International Union, AFL-CIO (the Charging Party, Union, Local 18 or Local 155) alleging that Finch, Pruyn &

[1] The allegations pertaining to the discharge of employees Hugh Capen and James Benway and the suspension of employee William Ryan alleged in paragraphs 13(a) and (b) of the complaint were resolved by the parties through a non-board settlement reached after the opening of the hearing. The General Counsel has no objections to the terms of the settlement. Accordingly, as the settlement between the parties effectuates the purposes and policies of the Act, I approved and made it a part of the record (ALJ Exh. 2). Allegations concerning the status of these employees as economic or unfair labor practice strikers are still pending and will be addressed in the subject decision.

[2] Prior to the opening of the hearing the Union made a motion to disqualify me as the designated trial judge due to my former service as Special Counsel to the General Counsel between 1976 and 1979, when John S. Irving, Esq., one of Respondent's attorneys, served as General Counsel of the Board (ALJ Exh. 1). I denied the motion on the record for the reasons stated in the transcript (Tr. 5-8).

Company, Inc., (the Respondent or Employer), has engaged in certain violations of Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act). The Respondent filed a timely amended answer to the complaint denying that it had committed any violations of the Act.

Issues

The complaint alleges that Respondent engaged in violations of Section 8(a)(1) and (5) of the Act by its failure to provide necessary and relevant information to Local 18 and Local 155, its unilateral elimination of the pcc oiler position and the unilateral subcontracting of its pulp mill and woodyard without notice or negotiations with the Union. Additionally, the complaint alleges that effective June 16, 2001,[3] certain employees of Local 18 and Local 155 commenced an economic strike that was prolonged by Respondent's subcontracting of its pulp mill without notice or negotiations with the Union in violation of Section 8(a)(1) and (5) of the Act, thereby converting the economic strike to an unfair labor practice strike for which the Respondent failed or refused to reinstate some of the striking employees in violation of Section 8(a)(1) and (3) of the Act. Lastly, the complaint alleges that the Respondent eliminated the pcc oiler position and failed to recall a striker to an available oiler position in violation of Section 8(a)(1) and (3) of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the helpful briefs filed by the General Counsel, Charging Party,[4] and the Respondent[5], I make the following

Findings of Fact

I. Jurisdiction

The Respondent is a corporation engaged in the manufacture of paper at its facility in Glens Falls, New York, where it annually sold and shipped goods and materials valued in excess of $50,000 directly to customers located outside the State of New York. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. Background

1. Respondent's Operation

Respondent is a privately held corporation that has been in existence for 138 years. It has a Board of Directors and individual stockholders. Since 1985, Richard J. Carota has been Chairman, President and CEO. Respondent manufactures approximately 240,000 tons per year of premium uncoated printing papers for advertising, book publishing and business office

[3] All dates are in 2001 unless otherwise indicated.

[4] The Charging Party's unopposed motion to correct the transcript attached to its brief, is granted.

[5] By Motion dated March 12, 2004, the Respondent moved to strike portions of the General Counsels and Charging Party's post-hearing briefs. The General Counsel and the Charging Party filed Oppositions to the Motion. In view of my findings herein regarding the issues raised in the Motion, it is not necessary to make a ruling.

uses nationwide. For many years Respondent's employees have been represented for collective bargaining purposes by seven labor organizations including Local 18 and 155. Local 18, has a practice of entering into separate collective-bargaining agreements with the Respondent, as does Local 155. Historically, the last two five year collective-bargaining agreements have expired on the same day (GC Exh. 2, 4, 67, and 68). Thus, bargaining for successor agreements normally occurs at the same time for all unions including Local 18 and 155. Local 18 represents employees that work in the shipping, finishing, converting, buildings & grounds, waste treatment, warehousing, material handling, woodyard and pulp mill portions of the operation. At the time of the economic strike, there were approximately 300 Local 18 bargaining unit members, 75 of whom worked in the Employer's pulp mill and woodyard. The most recent collective-bargaining agreement between Respondent and Local 18 is effective from November 24 through December 31, 2006 (GC Exh. 3). Local 155 represents employees that work in the machine room, paper mill, pulp prep and quality (paper lab) departments. At the time of the economic strike there were approximately 149 Local 155 bargaining unit members, none of who worked in the Employer's pulp mill or woodyard. The most recent collective-bargaining agreement between the Respondent and Local 155 is effective from November 24, through December 31, 2006 (GC Exh. 5).

2. Prestrike Bargaining

The parties engaged in approximately 45 prestrike meetings some of which included all the unions while others involved independent negotiation sessions between each union and the Employer. At the first general meeting held on May 14, attended by all seven Union's, Carota made a presentation entitled "The Ticonderogians are coming" (R Exh. 38). He focused on their main competitor International Paper who has a plant geographically proximate in Ticonderoga, New York, that had been making inroads on the Employer in the critical specifications of brightness, quality, and smoothness. Carota informed the seven Union's that International Paper, whose papermaker employees are represented by the same International Union, does not pay its employees double time and pays less than one-half the cost of their employee health care plan. Likewise, Respondent's retirement plans, life insurance and meal allowances are more costly then their chief competitor with International Paper having a substantial labor cost advantage of $90/ton compared to the Employer's labor cost of $150/ton. This information set the tone for Respondent's message to its employees that in order to stay competitive, it would be necessary to seek concessions during the upcoming negotiations. Indeed, just prior to the commencement of negotiations, employees were notified that one of the paper machines would be shut down for approximately two weeks due to lack of orders and excessive high paper inventories. It was known to all parties that the pulp and paper industry was in the midst of a major recession (R Exh. 19).

On May 15, at the first substantive negotiation meeting among the parties, Local 18 and 155 submitted their individual 2001 Labor Negotiation Agendas to the Employer (R Exh. 2 and 3). Additionally, the Unions presented a Main Agenda for the 2001 negotiations (R Exh. 34). Historically, common provisions in each of the seven union's agreements were negotiated together and at the same time with the Employer. For example, some of these items include profit sharing, wage increases, vacation benefits, group life insurance, healthcare, retirement, sick pay, holidays, double-time and holiday pay, disability pay and workers compensation. The Employer calculated that the cost for the Main Agenda items would be an increase of approximately $11,429,129 (R Exh. 35).

As the negotiations approached June 15, the date the then collective-bargaining agreements for all seven unions were set to expire, the Employer provided on June 14 as requested by the Union, a last best contract offer that was subsequently rejected. The

Employer declared the parties were at impasse and implemented its last best contract offer. The Union filed unfair labor practice charges on June 17, asserting that the Respondent engaged in surface bargaining, bargained to impasse on a non-mandatory subject of bargaining (unit scope), made regressive proposals, would not meet with the Union, or refused to accede to the Union's demands in order to frustrate agreement. The Regional Director for Region 3, on September 14, refused to issue a complaint and on January 30, 2002, the General Counsel on appeal determined that further proceedings were deemed unwarranted. In pertinent part, the General Counsel determined that the evidence demonstrated that a genuine bargaining impasse limited to mandatory subjects was reached on June 15. In this regard, the evidence showed that prior to impasse the Employer met with the Union over 40 times and presented approximately 16 proposals. In addition, the Employer made numerous concessions to the Union on both economic and non-economic issues, and ultimately withdrew 10 of its proposals in a good faith attempt to reach agreement. Further, the Employer continuously supplied the Union with explanations based on documentation and objective evidence in order to support its bargaining position that it deemed concessions from the Union necessary in order to afford it greater flexibility so that it could remain competitive. Although the Employer took a hard position in bargaining, it revised its initial proposal that employees pay their own health insurance premiums, and it offered a $1000 annual lump sum payment to employees that it later increased to $1500.

3. Prestrike Planning

The Employer recognized that a strike in 2001 was a strong possibility, as it had endured a 19-day strike in 1996 when supervisors filled in and paper was produced at a reduced capacity. A contingency plan was developed that provided for an orderly shutdown of the pulp mill (R Exh. 20). The Respondent decided that if a strike did occur, it would not operate the pulp mill but would attempt to purchase a superior grade of hardwood kraft pulp on the open market and slowly produce paper starting with the operation of one paper machine. As part of the contingency plan, the Respondent was aware that it could operate one paper machine for approximately the first month of the strike with the 1000 tons of previously produced stored pulp. Once exhausted, it would then have to depend on the hardwood kraft pulp to maintain its business operation. While the Respondent on occasions previously purchased small amounts of hardwood kraft pulp to use during planned and unplanned shutdowns or emergencies, it was uncertain if the hardwood kraft pulp would enable it to maintain the high quality of its paper products for distribution to its customers.

4. The Strike and Continued Plant Operation

On June 16, certain employees of Local 18 and 155 engaged in an economic strike due to the parties' inability to come to an agreement on the wide disparity over wages and benefits that the Respondent sought in order to remain competitive with its rivals. The Union, in commencing the strike, was of the opinion that they possessed leverage due to the unique expertise of their employees in producing a sophisticated product and working on complex machines that would be difficult to operate with supervisors or retired employees over an extended period of time.

Respondent, in order to operate its paper mill and continue to remain in business, began to purchase hardwood kraft pulp on the open market since prices were at a 20-year historical low. Thus, the Respondent was able to purchase the pulp for less than it would cost to produce its own unique ammonium bi-sulfite pulp. Respondent knew its employees would be eligible for at least 26 weeks of unemployment insurance so enough pulp was initially purchased to last into early 2002. As the strike continued to progress into the summer and early fall of 2001, and the

strikers began to draw vacation pay that had been accrued, the Respondent forecasted that the strike could be extended and decided to buy additional hardwood kraft pulp on the open market as prices remained low in comparison to producing its own pulp.

5. Negotiations and Developments during the Strike

The parties engaged in eight collective-bargaining sessions after the commencement of the strike on June 16. The first substantive meeting occurred on September 26, with the Union for the first time offering to contribute 5% to their health care costs and the Employer standing firm that the employees pay 50% of the costs similar to their primary competitors.

Newspaper articles in August and September 2001, confirmed that the parties were at a standstill on economic issues and the Union made assertions that the Respondent is not capable of making its customary top-quality paper because its skilled workers are on strike and the pulp mill is purchasing pulp rather then using its own sodium bicarbonate process to produce pulp (R Exh. 9 and 10).

By letter dated October 15 to all employees, the Respondent noted that due to the Union's recent rejection of a revised last best offer that made substantial movement on family health insurance and additional compensation for each striking employee, it was necessary to take steps to support the long-term operation of the mill and, accordingly, they had begun to hire permanent replacement workers in all areas of the facility with the exception of the pulp mill (R Exh. 46).

During the negotiation session of November 13, the Union inquired about the current status of the pulp mill and was informed by Respondent that no determination had been made to reactivate it as the price of purchased pulp was still below what it costs to make their own. At the conclusion of this meeting, the Union was provided with a revised last best offer that would remain open through November 20.

The next bargaining session took place on November 19. The Union apprised the Respondent that the membership had voted on the revised offer and it was overwhelmingly rejected. The Union stated that if the Employer were truly interested in coming to terms, it would eliminate the maintenance of membership portion of the offer and reinstate the union security clause, modify the pension benefit by permitting employees to lump out after 25 years and provide amnesty for all strikers. The Respondent rejected these proposals but at the Union's request agreed to extend the last best offer to November 23, so that a re-vote could be taken. The Union negotiators informed the Respondent that they would take the last best offer back to the membership with a recommendation to approve the agreement (R Exh. 43).

On November 21, a second ratification meeting occurred for members of Local 18 and Local 155. The result of the tabulated votes showed that the Union had ratified the agreement. The Union communicated these results to the Respondent and the parties agreed that the strike was officially ended on November 21.

On November 24, Local 18 and 155 entered into separate collective-bargaining agreements with the Respondent, which are effective until December 31, 2006.

On November 26, Local 18 and Local 155 entered into separate recall agreements that detailed the procedures for the recall of strikers to pre-strike positions when a vacancy occurs (GC Exh. 6 and 7).

The pulp mill remained closed during the remainder of 2001, the entire year of 2002 and into the first half of 2003. By memorandum dated February 26, 2003, Respondent apprised all employees that it planned to reopen the pulp mill in early June 2003. The Respondent explained that the decision to reopen the pulp mill was based in part on the fact that purchase orders existed to buy hardwood kraft pulp through June 2003 but the market price of pulp is then expected to exceed the current estimate to produce our own pulp. Second, the New York State Department of Environmental Conservation apprised us that if the pulp mill remains shut down beyond June 2003, it could possibly require the re-permitting of the entire pulping operation, a lengthy process that could cost millions of dollars and require the pulp mill to be closed for an indefinite period. Accordingly, the striking employees in the pulp mill were informed that commencing in April 2003, they would be recalled as needed to their pre-strike positions (R Exh. 31). As of June 2003, the majority of the striking employees in the pulp mill have been recalled to their pre-strike positions.

B. The 8(a)(1) and (5) Allegations

1. The Refusal to Provide Information

The General Counsel alleges in paragraph 9 of the complaint that Local 18 and Local 155 independently requested certain items of information in January and February 2002, which was necessary and relevant to its performance as the exclusive collective bargaining representative of each unit.

By letter dated January 23, 2002, Local 18 sought a copy of contracts relating to the purchase of contract pulp and on February 24, 2002, it sought weekly schedules and the date, time and place where replacement workers were given pre-employment physical examinations and drug screening tests.

By letter dated February 9, 2002, Local 155 sought the location of where certain replacement workers took their pre-employment physicals/drug screening tests and on February 25, 2002, it requested additional clarification on issues related to drug screening.

Respondent, in a letter dated January 29, 2002, informed Local 18 that the information regarding the purchase of contract pulp was financial data that it intended to keep confidential. The Respondent referenced a prior arbitration in which the arbitrator overruled the Union's request for confidential information and concluded the letter by confirming earlier advice that it does not anticipate starting the pulp mill in the foreseeable future, based on cost and quality considerations. In a subsequent letter dated February 7, 2002, the Respondent reiterated the same information as contained in its January 29, 2002, letter and noted in the interests of good labor relations that it has placed orders for purchased pulp for the entire year of 2002.

In letters dated February 22 and March 6, 2002, the Respondent replied to Local 18's requests on drug screening and pre-employment physicals. Local 18 was informed that pre-hire drug screening was not a matter within their representational responsibilities and could result in divulging confidential information. The Respondent concluded the letters by informing Local 18 that all new employees undergo pre-hire physicals and drug screening, whether or not they later become union members.

By letters dated February 6 and March 6, 2002, Respondent replied to Local 155's requests for information regarding drug screening. As it had done with Local 18, Respondent informed Local 155 that pre-hire drug screening was not a matter within their representational responsibilities and could result in divulging confidential information. The Respondent, while

declining to provide the information requested, apprised Local 155 that all new employees undergo pre-hire drug screening.

The Supreme Court in the case of *Detroit Edison Co. v. NLRB,* 440 U.S. 301 (1979) provided a balancing test for accommodating a union's need for information and an employer's need to protect confidential information.

In resolving issues such as presented in the subject case, the Board held in *GTE California, Inc.,* 324 NLRB 424, 426 (1997) that:

> An employer has a statutory obligation to provide requested information that is potentially relevant and will be of use to a union in fulfilling its responsibilities as the employees' exclusive bargaining representative….
>
> A union's interest in relevant and necessary information, however, does not always predominate over other legitimate interests…. Thus, in dealing with union's requests for relevant but assertedly confidential information possessed by an employer, the Board is required to balance a union's need for the information against any legitimate and substantial confidentiality interest established by the employer.

The legitimacy of the Union's need for information contained in pre-employment physicals and drug-screening reports is clear, especially in view of the fact that it would be the exclusive bargaining representative of any replacement employees. Information related to workplace safety and health is generally, relevant and necessary for the Union to carry out its bargaining obligations. *Minnesota Mining & Mfg. Co.,* 261 NLRB 27, 29 (1982), enfd. sub nom. *Oil Workers Local 6-418 v. NLRB,* 711 F2d 348 (D.C. Cir. 1983).

On the other hand, an employer certainly has a strong confidentiality interest with respect to the names and what facility replacement workers were tested in prior to their hiring.

The Board in *Pennsylvania Power,* 301 NLRB 1104 (1991), found that the respondent employer proved a legitimate and substantial confidentiality defense justifying its refusal to provide the names of informants who provided information about suspected drug use. Indeed, the serious public and employee safety considerations as in the subject case were present in the Board's analysis of the facts in *Pennsylvania Power.*

While the Respondent asserts a legitimate and substantial confidentiality interest in not releasing the names and what facility replacement workers were tested in for drug use prior to their hiring, I am of the opinion that the confidentiality interest was not so substantial as to justify the Respondent's blanket refusal to provide any information in response to the Union's requests. Thus, the Respondent had an obligation to come forward with some offer to accommodate both its concerns and the Union's legitimate needs for the information. Here, the Respondent made no offer to release the information conditionally or by placing any restrictions on the use of the information. Since the Respondent made no effort to bargain to accommodate the Union's interest in seeking relevant information and flatly refused the information sought by both Local 18 and Local 155 regarding pre-employment physicals and drug screening for replacement employees, it violated Section 8(a)(1) and (5) of the Act. Therefore, the violation found is the failure to bargain over an accommodation (i.e., an alternative means of satisfying the Union's need), not the failure to provide the location of testing or the names of the replacement employees who undertook pre-hire physicals and drug screening tests.

In regard to Local 18's request for copies of contracts for purchased pulp to determine whether the Respondent has adequate justification for failing to recall strikers to their jobs in the pulp mill, I do not find that such information is relevant and necessary to Local 18's representational responsibilities. In this regard, the information sought would disclose sensitive information of competitive significance for which an employer is not required to disclose. *Nielsen Lithographing Company,* 305 NLRB 697 (1991). Second, copies of contracts for purchased pulp that were requested in January 2002, is not necessary to determine adequate justification for failing to recall strikers to jobs in the pulp mill especially in light of the fact that Local 18 was informed in August, October and November 2001, and on subsequent occasions, that the pulp mill would not be started for the foreseeable future and that hardwood kraft pulp had been purchased not only through February 2002 but for the entire year of 2002 (GC Exh. 17). Third, the Union withdrew allegations in Case 3-CA-23461-1 that since January 17, 2002, the Employer failed to recall unreinstated strikers to open positions in the wood yard (CP Exh. 2 (c)). Fourth, prior to the subject information request the parties on November 26, had negotiated a recall agreement that detailed the procedures in which striking employees would be recalled when vacancies occurred. Lastly, contrary to the General Counsel's assertion that the pulp contracts were relevant to the Union's consideration of the subject unfair labor practices, it is noted that when the instant information request was filed in January 2002, the third amended charge in case 3-CA-23461-1 had not been filed that alleges the economic strike converted to a unfair labor strike in July 2001, when the Respondent unilaterally subcontracted its pulp mill by purchasing a superior grade of hardwood kraft pulp on the open market. I also note that in response to the Charging Party's subpoena, the information was provided by the Respondent.

For all of the above reasons, I recommend that paragraph 9(a) of the complaint be dismissed.

2. Elimination of the pcc Oiler Classification

The General Counsel alleges in paragraph 10 of the complaint that Respondent eliminated the pcc oiler position in or around December 2001, without notification or bargaining with Local 155 over the conduct and effects of this conduct.

In May 1997, the Respondent suspended Local 155 employee Bernard Palmer for a period of four months because he allegedly engaged in acts of sabotage by shutting down a valve to the head box causing the flow of papermaking fiber to be interrupted and the machine to stop operations. Local 155 filed a grievance over the suspension, which ultimately was referred to arbitration. The Arbitrator held that the suspension was not for just cause and awarded backpay and loss of seniority during the period Palmer was out of work (GC Exh. 64). The Respondent abided by the arbitration award and placed Palmer in the position of a pcc oiler who was responsible for lubricating certain valves in a particular portion of the mill. Palmer credibly testified that while he was paid a salary commensurate with other full-time Local 155 employees who were classified as basement or machine room oilers, his job responsibilities only took him approximately one hour per day. Palmer also acknowledged that after returning to work from the 1996 strike, he was classified as a basement oiler and performed the duties and responsibilities of that position in addition to handling the duties of the pcc oiler job that took approximately10% of his time.

The Respondent asserts that the position of the pcc oiler never existed until it assigned Palmer to the job full-time after the arbitrator determined that his suspension was not for just cause. Palmer was placed in that position because of the Respondent's continued concern that he had engaged in acts of sabotage and they did not want to return Palmer to that section of the

mill where the alleged acts occurred. The Respondent argues that while the pcc oiler classification still exists, they determined not to fill the position during the strike and after the strike ended the duties of that position could be performed more efficiently by other tour oilers who possessed the same skills.[6] Indeed, as of the date of the hearing, the pcc oiler position has not been filled.

If the pcc oiler position were eliminated in December 2001, as alleged by the General Counsel, there would have been an obligation to notify and engage in appropriate negotiations with the Union. The facts, however, dictate otherwise. In this regard, at the commencement of the strike when Palmer and other Local 155 employees' ceased work, there was no need to fill the pcc oiler position, as the duties were not independently required. Once the strike ended, the duties could be performed as part of the responsibilities of the tour oiler position. Accordingly, as certain oiler room employees were recalled after the strike, the employee with the greatest seniority under the parties' recall agreement could adequately perform the duties of the pcc oiler position.

Therefore, I find that the pcc oiler position was never eliminated. Rather, the position was never filled during or after the strike ended. Since the position was never eliminated, and indeed still exists, there was no duty to notify and negotiate with Local 155. Therefore, I recommend that the allegations in paragraph 10 of the complaint be dismissed.

3. Subcontracting of the Pulp Mill

The General Counsel alleges in paragraph 11 of the complaint that in or about July 2001, but without Local 18's knowledge until on or about November 14, Respondent unilaterally subcontracted its pulp mill without prior notice or affording Local 18 an opportunity to bargain with respect to the conduct and the effects of this conduct.

The General Counsel principally relies on two cases in arguing that Respondent has violated the Act as alleged in the complaint. In *American Cyanamid Company*, 235 NLRB 1316 (1978), enfd. 592 F.2d 356 (7th Cir. 1979), the Board in a short-form adoption held that the employer violated Section 8(a)(1) and (5) of the Act when, during an economic strike, it contracted out unit maintenance and service work on a permanent basis without notifying or bargaining with the union. The administrative law judge found that during an economic strike, and in the midst of bargaining for a labor agreement, the employer decided to permanently contract all of its maintenance and service work, a decision affecting approximately 200 employees or nearly half of the bargaining unit. In furtherance of this decision, the employer on January 9, 1976, made permanent an existing temporary contract arrangement under which such work was being performed and advised the union of the elimination of those 200 jobs only after this was an accomplished fact. In concluding that the employer did not establish a business justification for its subcontracting decision, the judge found that the economic strike that was in progress was converted into an unfair labor practice strike on January 9, 1976, when the employer changed the temporary contract covering the work to a permanent agreement.

[6] The term "tour oiler" is another name for "machine room oiler". The duties of "basement oiler" and machine room oiler are similar, but they have separate work schedules and are separately considered in the call-in procedures under the collective-bargaining agreement between the Respondent and Local 155.

In *Fiberboard Paper Products Corp. v. NLRB,* 379 U.S. 203 (1964), which predated *American Cyanamid*, the Supreme Court held that the "replacement of employees in the existing unit with those of an independent contractor to do the same work under similar conditions of employment" was a mandatory subject of bargaining under Section 8(a)(1) and (5) of the Act. That case, which did not involve a strike situation, involved the contracting out of maintenance work after expiration of a collective-bargaining agreement and for economic reasons, without first bargaining with the union. The maintenance work in question continued to be performed in the plant by employees of the independent contractor instead of by employees of the employer.

The Respondent contends that the General Counsel's reliance on the above two cases is misplaced, and argues that the Supreme Courts decision in *First National Maintenance Corporation,* 452 U.S. 666 (1981), should be relied upon in finding that no bargaining obligation exists. That case stands for the proposition that an employer which was engaged in the business of providing housekeeping, cleaning, maintenance and related services for commercial customers was not required to bargain over the decision to terminate a contract that permanently shut down a part of its business for purely economic reasons. The Court made a special effort to distinguish its holding in the case from that of *Fiberboard* in concluding that the employer in terminating the contract had no intention to replace the discharged employees or to move the operation, the instant dispute that led to the cancellation of the contract was solely over the size of the management fee that the union had no control or authority over and the union involved was certified long after the economic difficulties arose and no issue was present regarding the employer's abrogation of ongoing negotiations or an existing bargaining agreement. Likewise, the Court determined that the actions of the employer did alter the company's basic operation and the reduction of labor costs was not at the base of the employer's decision to terminate the contract.

In the subject case, certain employees of Respondent commenced an economic strike on June 16, and effective October 15, permanent replacements were hired. Here, the Union was the bargaining representative for many years before the pulp mill was shut down. Additionally, negotiations were ongoing and when the parties reached lawful impasse on June 15, the collective-bargaining agreement was still in effect. Additionally, the production of paper was not halted and improvements were initiated while the pulp mill was shut down. Indeed, with the purchase of the hardwood kraft pulp on the open market the Respondent did not change the nature or direction of its business operation, and the same paper products with identical color and weight were produced using the same paper machines. See, *Bob's Big Boy Family Restaurants,* 264 NLRB 1369 (1982). Finally, Respondent did not terminate a portion of its business; rather it replaced the union represented employees in the pulp mill by subcontracting for the purchase of hardwood kraft pulp for a period of time. Likewise, during the entire time that hardwood kraft was purchased the Respondent retained the equipment necessary to manufacture pulp and reopened the pulp mill in June 2003. It then commenced using the retained equipment to manufacture its own pulp.

Based on the forgoing, and particularly noting that the purchase of the hardwood kraft pulp did not alter the Respondent's basic operation and in part the closing of the pulp mill resulted in a reduction of labor costs, I find that the issues in this case are matters that are not particularly suitable for resolution under a *First National Maintenance Corp.* analysis.

Long settled is the rule that an employer-at least absent an economic strike-is obligated to bargain with the union before it decides to subcontract. The basis for this requirement is that subcontracting erodes the bargaining unit and is an "appropriate" subject of bargaining.

In *Hawaii Meat Company v. National Labor Relations Board,* 321 F2d 397 (9th Cir. 1963), a case that preceded *Fiberboard* and *American Cyanamid Company,* the Court of Appeals determined that permanently contracting out is authorized to enable the employer to continue operating in an emergency situation thrust upon it by a strike.

In *Land Air Delivery v. NLRB, 862 F.2d 354 (D.C. Cir. 1988), cert. denied 493 U.S. 810 (1989)*, the Court of Appeals in enforcing 286 NLRB 1131(1987), found that the employer violated Section 8(a)(1) and (5) of the Act by permanently contracting out bargaining unit work during the course of an economic strike in the absence of notifying and bargaining with the union because the decision was not motivated by economic necessity. In this decision, the Court held that in its opinion the decision of the U.S. Court of Appeals for the Ninth Circuit in *Hawaii Meat Company* stands for no more than the proposition that an employer may not be obliged to bargain with a union about permanent subcontracting[7] during a strike when that subcontracting is necessary to the business purpose of keeping the plant continuously in operation and time of decision is of the essence.

In its line of cases concerning subcontracting during an economic strike, the Board uses the phrase "business necessity" to refer to decisions motivated by the desire to maintain business operations during the course of a strike. See *Elliott River Tours,* 246 NLRB 935 (1979) (board countenanced contracting out for two years which exceeded the duration of the strike because the subcontractor demanded a long term contract as a condition for taking on the work) and *Empire Terminal,* 151 NLRB 1359 (1965), *enfd. sub nom, Dallas General Drivers, Local No. 745 v. NLRB,* 355 F.2d 842 (D.C. Cir. 1966) (an employer is not under a duty to bargain over temporary subcontracting necessitated by a strike where the subcontracting did not transcend the reasonable measures necessary in order to maintain operations in such circumstances). In *Shell Oil Company,* 149 NLRB 283, 285 (1964), the Board held that the respondent was not under a duty to bargain over contracts let and completed in the course of the strike since this temporary subcontracting necessitated by the strike did not transcend the reasonable measures an employer may take in order to maintain operations in such circumstances.

The General Counsel's complaint in paragraph 11 does not address whether the unilateral subcontracting of the pulp mill was of a temporary or permanent nature.[8] In evaluating whether the actions of the Respondent were motivated by the desire to maintain business operations during and after the course of the strike, the facts leading up to the strike are instructive.

Respondent, based on their prior experience of enduring a strike in 1996, developed a strike contingency plan coinciding with the commencement of negotiations in May 2001. The parties engaged in extensive bargaining between May 15 and June 15, when they reached lawful impasse and the Respondent implemented the last best contract offer that had been rejected by the Union. There is no dispute that when the strike commenced on June 16, it was based on an inability to agree on economic issues. The Respondent began an orderly shut down of the pulp mill on June 15, but knew it could continue to manufacture paper on one of its four paper machines for approximately a one-month period using the 1000 tons of stored pulp previously produced before the strike. As part of its contingency plan, the Respondent was aware that the cost of hardwood kraft pulp on the open market was at historical low prices and

[7] The Court took the term to mean subcontracting for an indefinite future period not to terminate at the expiration of the strike.

[8] The pulp mill was shut down for approximately two years commencing on June 15.

decided to purchase it in large quantities in order to remain in business and supply its customers with paper products after it exhausted its supply of stored pulp. In this regard, there was no single subcontract for the purchase of hardwood kraft pulp. Rather, the Respondent made periodic spot purchase orders based on its operational needs relative to the duration of the strike following the same practices as before the strike when it purchased hardwood kraft pulp from preferred suppliers. At the time this decision was made, the Respondent was uncertain whether it would eventually be able to produce quantities of paper at pre-strike levels or whether the quality of its product would be diminished in any manner.

Based on the forgoing, I find that when the Respondent initiated the purchase of large quantities of hardwood kraft pulp in or around the date of the strike and continued that practice until early 2003, it did so in order to maintain its paper making operations and was not undertaken because of union animus.[9] Therefore, I find that the holdings of the Board discussed above (temporary subcontracting) and the decisions of the United States Court of Appeals in *Hawaii Meat Company and Land Air Delivery* (permanent subcontracting), privilege the Respondent's subcontracting in this case and relieve it of any obligation to negotiate the subcontracting of the pulp mill and the purchase of hardwood kraft pulp on the open market in order to remain in business while countering the effects of an economic strike.

Accordingly, I recommend that the allegations in paragraph 11 of the complaint be dismissed.

The General Counsel opines that if a *Fiberboard* violation cannot be established then the Board's holding in *Dubuque Packing Co.,* 303 NLRB 386, 391 (1991), *enfd. sub nom. Food & Commercial Workers Local 150-A v. NLRB,* 1 F.3d 24 (D.C. Cir. 1993) should be followed in concluding that the subcontracting herein is a mandatory subject of bargaining. In that case, the Board recognized that an employer's decision to relocate bargaining unit work might be a mandatory subject of collective bargaining:

> Initially, the burden is on the General Counsel to establish that the employer's decision involved a relocation of unit work unaccompanied by a basic change in the nature of the employer's operation. If the General Counsel successfully carries the burden in this regard, he will have established prima facie that the employer's relocation decision is a mandatory subject of bargaining.
> At this juncture, the employer may produce evidence rebutting the prima facie case by establishing that the work performed at the new location varies significantly from the work performed at the former plant, establishing that the work performed at the former plant is to be discontinued entirely and not moved to the new location or establishing that the employer's decision involves a change in the scope and direction of the enterprise. Alternatively, the employer may proffer a defense to show by a preponderance of the evidence: (1) that labor costs (direct and/or indirect were not a factor in the decision or (2) that even if labor costs were a factor in the decision, the union could not have offered labor cost concessions that could have changed the employer's decision to relocate.

Applying these guidelines to the subject case, I am not convinced that the subcontracting of the pulp mill is covered under the standards set forth above. In *Dubuque*, the analysis involved a relocation of unit work from one location to another. Here, the work was not

[9] The complaint does not allege that the subcontracting was in any way based on union animus or was violative of Section 8(a)(1) and (3) of the Act.

relocated. Rather, a superior grade of hardwood kraft pulp was purchased on the open market and was used in place of the pulp previously manufactured by the striking employees for the production of paper on the same machines that previously were used pre-strike. If others disagree with this conclusion, I would still find that the Union was not capable of offering labor cost concessions that could have changed the employer's decision to subcontract the pulp mill and purchase hardwood kraft pulp on the open market. In this regard, the costs of the Union Main Agenda items presented at the commencement of bargaining were in excess of 11 million dollars (R Exh. 34 and 35). During the course of negotiations both before and after the strike, there were minimal monetary concessions offered by the Union. In fact, during the last substantive negotiation session held on November 19, the Union still insisted on an expensive pension enhancement proposal that would have significantly increased the life annuity and health care costs for retirees. Thus, at no time up to the date the strike ended did the Union make any substantive economic proposals to offset any of their proposed Main Agenda Items, never offered direct or indirect labor cost concessions nor did they offer the Respondent concessions on the difference that it was saving in purchasing hardwood kraft pulp on the open market in comparison to producing its own pulp.

Accordingly, since the Union did not and could not have offered labor cost concessions, I find that it would have been unable to change the Respondent's decision to purchase hardwood kraft pulp on the open market and therefore, the Respondent had no obligation to negotiate over the subcontracting of the pulp mill.[10]

4. Whether the Economic Strike Converted to an Unfair Labor Practice Strike

The General Counsel alleges in paragraph 12(c) of the complaint that the economic strike was prolonged by the unfair labor practices of Respondent in unilaterally subcontracting its pulp mill without prior notice to or affording Local 18 an opportunity to bargain with respect to the conduct and the effects of this conduct. The complaint alleges strike conversion without knowledge by the strikers of the conduct later alleged to be an unfair labor practice.

The Board has consistently held that an employer's unfair labor practices during an economic strike do not automatically convert it into an unfair labor practice strike. Such conversion would be found only when there is proof of a causal relationship between the unfair labor practice and the prolongation of the strike. *Anchor Rome Mills, Inc.,* 86 NLRB 1120, 1122 (1949).

A strike that begins as a dispute over economic issues may be converted to an unfair labor practice strike if the General Counsel establishes that the "unlawful conduct was a factor (not necessarily the sole or predominate one) that caused a prolongation of the work stoppage." *C-Line Express,* 292 NLRB 638 (1989), enf. denied on other grounds 873 F.2d 1150 (8th Cir. 1989). The Board will consider both objective and subjective evidence in assessing whether the General Counsel has met his burden:

> Applying objective criteria, the Board and reviewing court may properly consider the probable impact of the type of unfair labor practice in question on reasonable strikers in the relevant context. Applying subjective criteria, the Board and court

[10] Contrary to the General Counsel and Charging Party's argument in brief that the Union has the capability of offering the Respondent significant cost savings by agreeing to work for minimum wages and reduced benefits, LaBrum publicly stated on August 30 that, "Our people aren't going to go back for less than what they were making before the strike." (R Exh. 9).

> may give substantial weight to the strikers' own characterization of their motive for continuing to strike after the unfair labor practice. [Id., quoting *Soule Glass Co. v. NLRB,* 652 F.2d 1055, 1080 (1st Cir. 1980).]

The General Counsel concedes that Local 18 did not learn about the subcontracting of the pulp mill until November 14.[11] Moreover, there is no dispute that the Union did not make a request to negotiate over the purchase of hardwood kraft pulp or the refusal of the Respondent to reopen the pulp mill. Likewise, the record does not support the position that when Local 18 and Local 155 finalized their strike vote, the subcontracting of the pulp mill was discussed or was the underlying reason for the strike. Rather, the sole reason the employees voted for a strike was the Union's staunch opposition to the economic concessions sought by the Respondent. From the inception of the strike on June 16, until the first substantive negotiation session on September 26, the Union did not proffer any major economic concessions. The record does not contain nor was any evidence presented that the purchase of hardwood kraft pulp, which was open and notorious by September 26, was one of the reasons that the strike was prolonged. Indeed, according to the General Counsel's complaint it was not possible for the Union to have asserted that the strike was prolonged by the subcontracting of the pulp mill before November 14, since the Respondent did not officially inform the Union of this fact until that date. Even in the bargaining sessions held on November 13 and 19, the Union never asserted that the strike was prolonged based on the subcontracting of the pulp mill. Finally, the Union presented no evidence between November 14 and the end of the strike on November 21, that the subcontracting of the pulp mill prolonged the strike. It is also noted that the Union did not file the third amended charge until May 6, 2002, that alleged the conduct of subcontracting the pulp mill violated the Act and the strike converted to an unfair labor practice strike retroactively to July 2001, when the initial purchases of hardwood kraft pulp were made. This was a period nearly six months after the five-year contracts and striker recall agreements had been negotiated and approximately ten months after the alleged strike conversion in the absence of knowledge. *Mercedes Benz of Orlando Park,* 333 NLRB 1017, 1053 (2001) (the test is whether employees knew about the employer's conduct and sought to strike in protest of it).

Based on the forgoing, and particularly noting my above finding that there was no obligation for the Respondent to negotiate over the subcontracting of the pulp mill, I find that the evidence overwhelmingly supports both subjectively and objectively that the strike began as an economic strike and did not convert at any time subsequent to the strike's inception.

The General Counsel asserts in paragraph 12 (a) of the complaint that at all material times from on or about May 14, through November 21, Local 18 and Local 155 bargained jointly

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[11] The Respondent did not officially inform the Union of the subcontracting of the pulp mill until that date. Unofficially, union chief negotiator Robert LaBrum admitted that newspaper articles in June, July and August 2001, specifically discussed Respondent's purchase of hardwood kraft pulp on the open market (GC Exh. 15 and 16, R Exh. 10) and its use in the manufacture of paper on the same paper machines as pre-strike. Likewise, the Local 18 Union President testified that at no time during negotiations did Local 18 ever tell the Employer that if Local 18 had known about the status of the pulp mill, it would have ended the strike sooner. Thus, I reject the General Counsel's argument that had the Respondent notified the Union about the subcontracting, it might have abruptly ended what evolved into a long-term strike before the Employer permanently replaced its work force. In that regard, the Union was notified in advance of the Respondent's decision to hire permanent replacements yet it made no movement to end the strike during the approximately one month period between October 15 and November 14 when the hiring of permanent replacements was completed.

with Respondent for the purpose of negotiating their individual collective-bargaining agreements that were executed on November 24.

The Respondent, while denying the above assertions, explains that, at times, it bargained simultaneously with seven local unions including Local 18 and Local 155 but never bargained jointly with any of the union's.

The General Counsel argues, under its theory of joint bargaining between Local 18 and Local155, that when the economic strike converted to an unfair labor practice strike both Locals were impacted and therefore became unfair labor practice strikers with rights to reinstatement once they made unconditional offers to return to work.[12]

The Respondent vigorously denies this assertion and argues that any strike conversion which might have occurred, could only have been operative to Local 18 as they were the affected employees in the pulp mill and not to the separate unit of unaffected Local 155 represented employees.

I reject the General Counsel's theory of the case for the following reasons. First, as found above, I have determined that the strike which commenced on June 16 started and remained at all times an economic strike and never converted to an unfair labor practice strike. Second, in order to buttress the proposition of joint bargaining between Local 18 and Local 155, the General Counsel points to the historical practice of pooled voting engaged in by both Locals when undertaking strike and ratification votes.[13] The fallacy in this argument is revealed in chief union negotiator LaBrum's testimony wherein he admits that he was not aware of any written document regarding joint bargaining and none was provided to the Respondent prior to the commencement of bargaining on May 14, he never informed the other five unions that Local 18 and 155 would be engaging in joint bargaining, he never orally informed Respondent negotiators that Local 18 and 155 would be engaging in joint bargaining, he never orally informed Respondent negotiators about the practice of pooled voting nor did he put in writing or send the Employer a letter to this effect.[14] Union negotiator Michael Scarselletta also testified in the proceeding and agreed with the admissions of LaBrum. Further, LaBrum admitted that separate bargaining agendas for Local 18 and Local 155 were submitted to the Respondent at the inception of negotiations, that each Local union received a last best contract offer that was independently considered, and thereafter separate collective-bargaining agreements were executed with the Respondent.

For all of the above reasons, I reject the General Counsel's position that Local 18 and Local 155 were engaged in joint bargaining to sustain their argument that Local 155 employees became unfair labor practice strikers similar to Local 18 members who were employed in the pulp mill and were not notified about nor permitted to negotiate over the Respondent's purchase of hardwood kraft pulp at the inception of the strike.

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[12] The Union, at no time before or after the strike ended, made an oral or written offer to unconditionally return to work.

[13] The procedure of pooled voting consisted of separate votes being taken by both Locals and then the votes were pooled giving a united tabulation. In the subject case, because Local 18 had a larger membership then Local 155, they could control the results of the vote regarding strike or ratification issues and Local 155 would be bound.

[14] I also note that no reference to pooled voting was contained in LaBrum's pre-trial affidavit provided to the General Counsel prior to the issuance of the complaint.

C. The 8(a)(1) and (3) Allegations

1. Elimination of the pcc Oiler Classification

The General Counsel alleges that the elimination of the pcc oiler classification was not only undertaken without notice and bargaining with Local 155, but was also eliminated because of union animus.

In *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer decision. On such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The United States Supreme Court approved and adopted the Board's *Wright Line* test in *NLRB v. Transportation Management Corp.,* 462 U.S. 393, 399-403 (1983). In *Manno Electric,* 321 NLRB 278, fn. 12 (1996), the Board restated the test as follows. The General Counsel has the burden to persuade that antiunion sentiment was a substantial or motivating factor in the challenged employer decision. The burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employee had not engaged in the protected activity.

I am not persuaded under *Wright Line,* that the General Counsel has made a strong showing that the Respondent was motivated by antiunion considerations when it allegedly eliminated the pcc oiler classification.

In May 1997, the Respondent suspended Local 155 employee Bernard Palmer for a period of four months because he allegedly engaged in acts of sabotage by shutting down a valve to the head box causing the flow of papermaking fiber to be interrupted and the machine to stop operations. Local 155 filed a grievance over the suspension, which ultimately was referred to arbitration. The Arbitrator held that the suspension was not for just cause and awarded backpay and loss of seniority during the period Palmer was out of work (GC Exh. 64). The Respondent abided by the arbitration award and placed Palmer in the position of a pcc oiler that was responsible for lubricating certain valves in a particular portion of the mill. Palmer credibly testified that while he was paid a salary commensurate with other full-time Local 155 employees who were classified as basement or machine room oilers, his job responsibilities only took him approximately one hour per day. Palmer also acknowledged that after he returned to work from the 1996 strike, he was classified as a basement oiler and performed the duties and responsibilities of that position in addition to handling the duties of the pcc oiler job that took approximately10% of his time.

The evidence confirms that the position of the pcc oiler never existed in the mill until the Respondent assigned Palmer to the job after the arbitrator determined that his suspension was not for just cause. Palmer was placed in that position not because of union animus but due to the Respondent's continued concern that he had engaged in acts of sabotage and they did not want to return Palmer to that section of the mill where the alleged acts occurred. Significantly, Local 155 never protested or filed a grievance over Palmer's placement in the pcc oiler position after the issuance of the arbitrator's decision. The Respondent argues that while the pcc oiler classification still exists it determined not to fill the position during the strike. After the strike ended the duties could be performed more efficiently by tour oilers who possessed the same skills. Indeed, as of the date of the hearing, the pcc oiler position has not been independently filled.

The General Counsel alleges that the Respondent still harbored animus against Palmer due to the arbitration and his service as Local 155 President between 1993 and 1997. First, as I previously found earlier in the decision, the pcc oiler position has not been eliminated. In this regard, at the commencement of the strike when Palmer and other Local 155 employees' ceased work, there was no need to fill the pcc oiler position, as the duties were not required. Once the strike ended, the pcc oiler duties could be performed as part of the responsibilities of the tour oiler position. Accordingly, as certain oiler room employees were recalled after the strike, the employee with the greatest seniority under the parties' recall agreement could adequately perform the duties of the pcc oiler position. Thus, the General Counsel has not established that the pcc oiler position has been eliminated nor have they proved that Palmer was placed in the pcc oiler position because of his union activities.

Therefore, contrary to the General Counsel, I find that the pcc oiler position still exists but has not been filled since the strike ended due to legitimate business reasons unrelated to any union activities of Local 155.

Therefore, I recommend that the portion of the General Counsel's complaint that alleges that the pcc oiler position was eliminated because of union animus be dismissed.

2. Refusal to Recall Bernard Palmer

The General Counsel alleges in paragraph 13 (c) of the complaint that the Respondent failed to recall striker Bernard Palmer to an available oiler position because of his union activities.

As discussed above I am not persuaded under *Wright Line* that the General Counsel has made a strong showing that the Respondent was motivated by antiunion considerations in originally assigning Palmer to the pcc oiler position. Likewise, I am not convinced that the reason Palmer was not recalled to the available oiler position in January 2002 was due to his union activities.

In this regard, although Palmer testified that he had more seniority then co-worker Peter Peceu who was recalled to the vacant machine oiler position in January 2002, Palmer admitted that Peceu was listed ahead of him on the updated June 13 Department Seniority list and the machine oiler schedule. Local 155 Secretary/Treasurer Ronald Gates testified that Peceu was the most senior laid off worker on the pre-strike Department Seniority list and the machine oiler schedule and in accordance with those schedules he was recalled ahead of Palmer (GC Exh. 90).

On November 26, Local 155 and the Respondent negotiated a recall procedure that governed the recall rights of "unreinstated strikers" regarding the strike (GC Exh. 7).[15] The Respondent, in accordance with that schedule, determined that Peceu was the senior machine room oiler on the Department Seniority list and he was recalled ahead of Palmer. While the General Counsel alleges that Palmer is senior to Peceu (GC Exh. 12), and should have been recalled first to the vacant machine room oiler position, this argument is nothing more then a differing and arguable interpretation over the meaning of the recall agreement. Indeed, both

[15] The recall agreement at II (C) states in pertinent part: The updated Department Seniority list dated June 13, 2001 and, where appropriate, the last permanent department schedule will be used to identify the senior qualified employee to fill the permanent vacancy.

Palmer and Gates agree that if the Department Seniority list and the machine oiler schedule are relied upon for the recall of the most senior oiler, then Peceu should have been recalled in January 2002. In any event, the parties differing and arguable interpretation of the recall agreement does not rise to the level of an unfair labor practice. Moreover, as discussed above, I am not convinced that Palmer was originally placed in the pcc oiler position because of his union activities nor am I persuaded that Palmer was not recalled to the vacant oiler position in January 2002, because of union animus. Rather, I find that the Respondent followed the parties' recall agreement when selecting Peceu (a co-worker, union member and striker) as the most senior oiler to the available vacant machine room oiler position. Notably, Local 155 did not file a grievance contesting their interpretation of the recall agreement.

For all of the above reasons, I recommend that paragraph 13 (c) of the complaint be dismissed.

3. Refusal to Reinstate Some of the Strikers

The General Counsel alleges in paragraph 12 (f) of the complaint that the Respondent has failed and refused to reinstate some of the striking employees, and has delayed the reinstatement of other striking employees to their former positions of employment due to their union activities.

Based on my finding above that the June 16 strike commenced and remained at all material times an economic strike, I am unable to find that the striking employees were delayed or not reinstated to their former positions of employment due to their union activities. Rather, I find that the Respondent properly recalled unreinstated economic strikers in accordance with the negotiated November 26 recall agreements (GC Exh. 6 and 7).

Therefore, I recommend that paragraph 12 (f) of the complaint be dismissed.

D. Respondent's Affirmative Defenses

1. The Allegations in paragraph 11 of the complaint are Time Barred

The Respondent contends that the General Counsel's allegation in paragraph 11(a) of the complaint is barred by the statute of limitations in section 10(b) of the Act. The complaint alleges that the Union did not become aware of the subcontracting of the pulp mill until November 14, thus making the third amended charge in case 3-CA-23461-1 filed on May 6, 2002, timely filed within six months of the Union learning of the unlawful conduct. Contrary to this position, the Respondent argues that the Union was aware as early as June and July 2001 through newspaper articles that it had contracted to purchase pulp on the open market and accordingly, the third amended charge is untimely filed.

I am not persuaded that notification through the newspaper satisfies the Respondent's obligation to give notice to a collective-bargaining representative when changes in conditions of employment are contemplated. The record confirms that it was not until the November 13 collective-bargaining meeting and reaffirmed in writing on November 14 (GC Exh. 37) that the Respondent informed the Union that the pulp mill would be shut down for the foreseeable future and hardwood kraft pulp was being purchased on the open market.[16]

[16] Contrary to Respondent's argument in brief, I do not find that their October 4 letter addressed only to employees concerning the terms of a last-best contract offer and questions

Continued

Therefore, while the alleged violation of subcontracting the pulp mill took place more than six months before the filing of the third amended charge, the union did not have official notice of the subcontracting until a date within the six-month period. The limitation period does not begin to run until the party filing the charge knows that an unfair labor practice has occurred. See *NLRB v. International Brotherhood of Electrical Workers,* 827 F.2d 530, 533 (9th Cir. 1987).

Under these circumstances, the Respondent's argument that the third amended charge filed on May 6, 2002 was untimely filed is rejected.

2. The Hiring of Permanent Replacements

The Respondent contends that they lawfully hired permanent replacements before November 14, the date the General Counsel claims that Local 18 had knowledge of the subcontracting of the pulp mill as alleged in paragraph 11 of the complaint.

The Union argues that the hiring of the permanent replacements commencing on October 15 prolonged the economic strike and converted it into an unfair labor practice strike. Additionally, the Union asserts that the Respondent hired the permanent replacements in such a way as to mislead it, and therefore contests the legitimacy of their hire. At trial, I rejected this argument but permitted the Union to make an offer of proof.

The only portion of the General Counsel's complaint that references permanent replacements is found in paragraph 12(d).[17] It is, however, the allegations in paragraph 12(c) of the complaint that assert the strike was prolonged by the subcontracting of the pulp mill rather then the hiring of permanent replacements. Indeed, at no place in the complaint, does the General Counsel allege that the Respondent's hiring of permanent replacements violated either section 8(a)(1), (3) or (5) of the Act. Thus, I find that the Union is foreclosed from attempting to expand the parameters of the General Counsel's complaint. Since the complaint does not allege that the hiring of permanent replacement violated the Act in any manner, no such finding will be made. *Kimtruss Corp.,* 305 NLRB 710, 711 (1991) (The charging party cannot enlarge upon or change the General Counsel's theory of the case). Lastly, I note that the Union withdrew the identical allegation in the May 6, 2002, amended charge that alleged since October 15, the Employer misrepresented the status of replacement employees and thereby terminated the employment of striking employees (CP Exh. 2(c)).

The Union further argues that the Respondent's replacement of a union security provision in the proposed contract with the maintenance of membership clause at the November 13 collective-bargaining session prolonged the economic strike and converted it into an unfair labor practice strike (R Exh. 42). As with the Union's argument regarding permanent replacements, I also rejected testimony on this subject but permitted the Union to argue their position in brief. Once again, I find that the Union is attempting to expand the parameters of the General Counsel's complaint that does not allege the economic strike was prolonged based on Respondent's maintenance of membership proposal made during collective bargaining. I also note that the Union was presented with a last best contract offer on November 13 that included

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and answers regarding their status during an economic strike serves as notice to the Union when changing conditions of employment (GC Exh. 35).

[17] Paragraph 12(d) alleges: At the time that the strike described above in paragraph 12(b) converted to an unfair labor practice strike, Respondent had not permanently replaced the striking employees.

the maintenance of membership proposal which it initially rejected on November 19, but after reconsideration it was accepted, and the strike ended on November 21. Thus, for this additional reason, I reject the Union's position that the strike was prolonged because of the maintenance of membership provision. Further, in the General Counsel's letters dated January 30 and May 28, 2002, that addressed the Union's appeal and reconsideration of allegations of bad faith bargaining both before and after June 15, no finding of bad faith bargaining was made by the General Counsel (GC Exh. 1).

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) and (5) of the Act by its refusal to bargain in good faith with the Union in an attempt to reach an accommodation of interests in response to the Union's request for relevant information that the Respondent considers confidential.

4. Respondent did not eliminate the pcc oiler classification and therefore, did not violate Section 8(a)(1) and (5) of the Act.

5. Respondent had no obligation to negotiate over the subcontracting of its pulp mill and therefore, did not violate Section 8(a)(1) and (5) of the Act.

6. The Union did not bargain jointly with Respondent for the purpose of negotiating the parties' collective-bargaining agreement.

7. The economic strike that commenced on June 16, 2001, was not prolonged by the Respondent's subcontracting of the pulp mill nor did it convert to an unfair labor practice strike.

8. Respondent did not engage in violations of Section 8(a)(1) and (3) of the Act by refusing or delaying the reinstatement of striking employees to their former positions.

9. Respondent did not engage in violations of Section 8(a)(1) and (3) of the Act by eliminating the pcc oiler classification or failing to recall striker Bernard Palmer to an available oiler position.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[18]

[18] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Finch, Pruyn & Company, Inc., Glens Falls, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain in good faith with the Union in an attempt to reach an accommodation of interests in response to the Union's request for relevant information that the Respondent considers confidential.
(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Bargain in good faith with the Union regarding its request for the weekly schedules and the date, time and place where replacement workers were given pre-employment physical examinations and drug screening tests.
(b) Within 14 days after service by the Region, post at its facility in Glens Falls, New York copies of the attached notice marked "Appendix."[19] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 29, 2002.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. March 26, 2004

Bruce D. Rosenstein
Administrative Law Judge

[19] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT refuse to bargain in good faith with the Paper, Allied-Industrial, Chemical & Energy Workers International Union, AFL-CIO, in an attempt to reach an accommodation of interests in response to the Union's request for relevant information that we consider confidential.

WE WII NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL bargain in good faith with the Union regarding its request for the weekly schedules and the date, time and place where replacement workers were given pre-employment physical examinations and drug screening tests.

Finch, Pruyn & Company, Inc.
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

111 West Huron Street, Federal Building, Room 901, Buffalo, NY 14202-2387
(716) 551-4931, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (716) 551-4946.